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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: **AUG 07 2009**
LIN 07 074 54028

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is organized in the State of California as a family trust. The petitioner seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on the following independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; and 3) the petitioner failed to comply with the director's request for the foreign entity's organizational chart and copy of approval notice(s) for any petitions filed on the beneficiary's behalf.

On appeal, counsel disputes all three grounds for denial, asserting that the director expressly acknowledged the petitioner's prior approval notice. Additionally, the record clearly shows the petitioner's compliance with the director's earlier request for a copy of the foreign entity's organizational chart. Accordingly, as there is no basis for the director's findings in No. 3 above, the AAO hereby withdraws the third ground as a basis for denial. The remainder of this discussion will therefore be limited to the two remaining grounds as cited in Nos. 1 and 2 above.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> > (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is

required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated January 3, 2007, which includes the following description of the beneficiary's proposed employment:

> [The beneficiary] will establish [the petitioner's] goals and policies, oversee the development and expansion of the business, locate new properties as they become available on the market, perform initial profitability analyses, negotiate the acquisition of real estate, negotiate the sale and/or refinancing of the organization's real estate assets, negotiate with major subcontractors for the refurbishing of the rental units, carry out the disposition of the properties, set out rental policies and dispute resolution guidelines with tenants. [The beneficiary] will also explore the feasibility of exporting auto parts from the U[.]S[.] to Russia.
>
> More specifically, [the] beneficiary will be responsible for the management of [the] petitioner's business. He will consult with the [p]roperty [m]anager to determine whether the individual buildings are being managed adequately, whether the individual units are sustaining unusual wear and tear . . . , etc. [The b]eneficiary will review competitive bids for major repairs to the various buildings. The foregoing will take up 30% of [the] beneficiary's time. Secondly, [the] beneficiary will confer with local real estate brokers to review properties available for purchase and to direct them as to what properties to look for . . . . He will confer with mortgage brokers, bankers and other lending institutions to discuss ways of financing the purchases of the real properties . . . . In short, he will travel around southern California to locate new properties, perform initial profitability analyses and negotiate their acquisition. The foregoing will take up 40% of [the] beneficiary's time. The remaining 30% of [the] beneficiary's time will be spent on negotiating with major contractors the refurbishing of the buildings, setting rental policies and dispute resolution guidelines with tenants for the [p]roperty [m]anager to follow, conferring with [an] attorney to review and select adequate lease forms . . . .

The letter also indicated that the petitioner employs one full-time employee as the general property manager and further noted that independent contractors are used to provide plumbing, electrical, general contracting, roofing, painting, cleaning, pest control, and other repair services.

On December 10, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide its organizational chart as well as a detailed description of the beneficiary's proposed job duties.

In response, the petitioner provided a letter dated January 28, 2008 from its attorney, who reiterated the job description provided initially in the petitioner's support letter. Counsel further stated that the beneficiary would deal directly with the real estate, insurance, and mortgage brokers while the property manager would deal with all the service providers contracted to service the properties owned by the beneficiary. Additionally, the beneficiary himself provided a declaration, executed on January 28, 2008, in which he stated that he will be responsible for 1) ensuring that his properties are

occupied and that vacancies are filled; 2) screening prospective tenants; 3) ensuring that rent is promptly collected and the money deposited in the bank; 4) supervising prompt maintenance and repairs; 5) establishing an accounting program, which includes paying property-related bills, compiling reports for the properties, hiring and training the necessary personnel, and maintaining relationships with city inspectors and housing authorities; 6) preparing an annual budget; 7) reviewing vendor contracts; 8) supervising vendors; and 9) establishing a program for "debt retirement." In the meantime, the beneficiary stated that he plans to continue acquiring properties.

In a decision dated April 12, 2008, the director denied the petition based, in part, on the conclusion that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial capacity. The director properly noted that there is a difference between one who operates a business and one who manages an organization, implying that the beneficiary can be described as someone who operates a business, but is not necessarily employed in a capacity where the primary portion of his time is spent performing qualifying managerial or executive level tasks.

However, the AAO hereby withdraws the director's comment noting that the petitioner failed to establish that the beneficiary would be employed at a senior level within an organizational hierarchy. In light of the evidence and information that has been submitted, the AAO finds that the director's comment is inaccurate, as the petitioner has clearly established that, aside from the beneficiary himself, the petitioner employs only one other employee, who happens to be directly subordinate to the beneficiary. Thus, by virtue of having only one other employee whom the beneficiary directly supervises, the beneficiary is in fact at the top of the petitioner's simple organizational hierarchy. That being said, the director's overall determination with regard to the beneficiary's employment capacity in his prospective position is correct, as merely establishing the beneficiary's elevated position with the petitioner's organization does not establish that the duties to be performed by the beneficiary will be primarily managerial or executive within the meaning of section 101(a)(44) of the Act. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the present matter, while the petitioner has adequately established that the beneficiary does not perform the maintenance and repair services associated with property management, the beneficiary's own explanation of his role within the petitioning organization indicates that he has and would continue to perform numerous administrative tasks including marketing to fill vacant properties, screening tenants, ensuring that all necessary bills are paid, and directly dealing with vendors. In other words, the mere fact that the petitioner has a property manager to assist with the daily tasks does not relieve the beneficiary from having to perform the numerous other non-qualifying tasks that the petitioner requires, given the nature of the property management business and the type of personnel structure the beneficiary has currently instituted. While counsel argues the number of employees the petitioner has is irrelevant to the overall question of eligibility, federal courts have deemed this as a relevant factor and have generally agreed that U.S. Citizenship and Immigration Services (USCIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of*

Transkei v. INS, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). In other words, the petitioner's severely limited number of support personnel inherently raises the question of who performs the petitioner's daily operational tasks and how the petitioner is able to relieve the beneficiary from having to primarily focus on non-qualifying tasks as part of his daily routine. While the AAO concedes that there may be instances where a limited support staff does not preclude the beneficiary from primarily performing tasks within a qualifying managerial or executive capacity, the burden is on the petitioner to provide a detailed discussion that explains how it functions on a daily basis, who performs its daily operational tasks, and what specific managerial or executive tasks consume the primary portion of the beneficiary's time. In the present matter, neither counsel's arguments nor the beneficiary's job description serve as compelling evidence of the petitioner's ability to employ the beneficiary in a qualifying managerial or executive capacity.

The beneficiary's own statements as well as the initially submitted description of the proposed position indicate that the primary portion of the beneficiary's time has been and would be spent performing non-qualifying tasks that are directly associated with the acquisition of new real estate properties as well as assisting the property manager with overseeing the properties that have already been acquired and are currently rented or those that need to be rented. As previously stated, 40% of the beneficiary's time will be spent traveling to locate new properties and negotiating the acquisition of properties that the beneficiary has determined to be suitable. Another 30% of the beneficiary time would be spent negotiating contracts to refurbish buildings and setting rental policies, including dispute resolution guidelines. Given this job description and the personnel structure that was in place at the time the Form I-140 was filed (and continuing through the present time), the AAO cannot conclude that the primary portion of the beneficiary's time would be spent performing tasks within a qualifying managerial or executive capacity. Therefore, based on this initial conclusion, this petition cannot be approved.

The second issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;
>
> * * *
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the petitioner has provided sufficient evidence to establish that the beneficiary owns and controls both the foreign and U.S. entities such that a qualifying relationship exists between the beneficiary's foreign and prospective employers. Therefore, the AAO hereby withdraws the director's second ground as a basis for denial.

However, in light of the evidence establishing the beneficiary's ownership of the U.S. entity, the AAO hereby finds that the petitioner is ineligible for the immigration benefit sought on another basis that was not discussed in the director's decision.

First, by virtue of the beneficiary's claimed ownership of the U.S. petitioner, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation. As explained in 8 C.F.R. § 204.5(j)(5), the petitioner must establish that the beneficiary will be "employed" in an executive or managerial capacity. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the multinational executive and managerial immigrant classification. Section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Further, section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. Finally, the specific definition of "managerial capacity" in section 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A), refers repeatedly to the supervision and control of other "employees." Neither the legacy Immigration and Naturalization Service nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigration classification. *See, e.g.,* 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of this immigrant classification, these terms are undefined.

The Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired

> party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." *See Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003); s*ee also New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity. As explained above, the petitioner is a corporation, which is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is no evidence that anyone other than the beneficiary himself is in a position to exercise any control over the work to be performed by the beneficiary. As such, it appears the beneficiary is the employer for all practical purposes. He will control the organization; set the rules governing his work; and share in all profits and losses.

Therefore, the petition must be denied on the additional ground that the petitioner has failed to establish that it has the requisite employer/employee relationship with the beneficiary.

Additionally, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Here, the petitioner claims that it is in the business of acquiring and managing real estate. While the petitioner has provided a list of properties it claims to have purchased for investment purposes, no documentary evidence has been submitted to establish the petitioner's purchase of these properties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, even if such evidence had been submitted, the latest property acquisition took place on November 31, 2005, which is nearly fourteen months prior to the date the petition was filed. The above regulatory provision clearly requires that the petitioner establish that it has been doing business for one full year prior to filing the petition, which in this matter is the time period commencing in January 2006 and leading up to the date of filing. Although the petitioner has provided the beneficiary's personal tax return and numerous bank statements and copies of cashed checks, these documents do not establish that the petitioner has engaged in the property management business during the time period and in the manner prescribed by 8 C.F.R. § 204.5(j)(3)(i)(D). Again, without sufficient documentation, the AAO cannot presume that the petitioner meets the necessary regulatory requirements. As the record lacks the necessary evidence documenting any ongoing business transactions during the requisite period, this finding will serve as the third basis for denial

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd,* 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.